

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	CG Docket No. 02-278
Petition of SCRIP HOLDING CO. for)	
Retroactive Waiver of)	CG Docket No. 05-338
47 C.F.R. § 64.1200(a)(4)(iv))	

REPLY IN SUPPORT OF PETITION FOR RETROACTIVE WAIVER

Scrip Holding Company, a/k/a Scrip, Inc., (“Scrip”) writes in response to Wilder Chiropractic, Inc.’s (“Wilder”) comments, filed October 9, 2015, opposing Scrip’s petition to the Federal Communications Commission (“Commission”), filed September 17, 2015. Scrip is petitioning the Commission to grant a retroactive, limited waiver for compliance with 47 C.F.R. § 64.1200(a)(4)(iv), which requires “opt-out” notices to be included on facsimile advertisements, as the Commission previously has done for other similarly-situated entities in its August 28, 2015 Order (“2015 Order”).¹ Specifically, Scrip seeks a waiver for facsimiles it sent prior to April 30, 2015, to entities with which it had an established business relationship and who previously provided consent to receive facsimiles, but that such facsimiles did not contain the opt-out notice required by the Telecommunications Consumer Protection Act (“TCPA”) and the enacting rules promulgated by this Commission. In response to Wilder’s comments, Scrip states as follows.

Introduction

On October 30, 2014, the Commission published Order 14-164 on Anda Inc.’s Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (Aug. 28, 2015) (“2015 Order”).

Requirement for Faxes Sent with the Recipient’s Prior Express Permission (“Anda Order”).² In the Anda Order, the Commission held that a previous order, issued in 2006,³ had created confusion with regards to when opt-out notices were required on facsimile advertisements sent to consenting receivers.⁴ The Anda Order invited similarly-situated, would-be petitioners to file petitions for retroactive waiver of the opt-out notice requirement by April 30, 2015.⁵

As of April 30, 2015, Scrip was unaware of any potential TCPA claims against it and as such was not monitoring orders from the Commission. In fact, and as stated in its petition, Scrip had not sent facsimile advertisements since August 2013. On June 30, 2015, Wilder initiated suit against Scrip, alleging violations of the TCPA that occurred prior to April 30, 2015, including sending facsimiles without the required “opt-out” language.⁶ On August 28, 2015, the Commission granted more than 100 petitions in its 2015 Order that were similarly situated to Anda’s, including several petitions that were filed after April 30, 2015.⁷ On September 17, 2015, Scrip filed its petition for retroactive waiver.⁸ On October 9, 2015, Wilder filed its comments on Scrip’s petition, to which Scrip now replies.⁹

ARGUMENT

I. The Commission Has the Authority to “Waive” Regulations.

Wilder’s response is a mere reiteration of failed arguments raised by other parties prior to

² *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“Anda Order”).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“Junk Fax Order”).

⁴ Anda Order, ¶ 36.

⁵ *Id.* ¶ 22.

⁶ *Wilder Chiropractic, Inc. v. Scrip, Inc.*, No. 15-cv-5778 (N.D. Ill.).

⁷ 2015 Order, ¶ 24.

⁸ *Petition for Waiver by Scrip, Inc.*, CG Docket Nos. 02-278, 05-338 (filed Sept. 17, 2015).

⁹ *Wilder Chiropractic, Inc.’s Comments on Scrip, Inc.’s Petition for Retroactive Waiver*, CD Docket Nos. 02-278, 05-338 (filed Oct. 9, 2015).

the Anda and 2015 Orders.¹⁰ Specifically, Wilder argues that the Commission cannot grant a waiver “with the effect of relieving Scrip of liability in a private right of action under the TCPA.”¹¹

However, the United States Supreme Court disagrees with that argument. The Supreme Court addressed this issue in *NCTA v. Brand X*. In that case, the Court held that “Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act ... and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act.”¹² Furthermore, the Court held that the Commission “is the authoritative interpreter (within the limits of reason) of such statutes.”¹³ The mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut the Commission’s authority to define the scope of when and how those rules apply.¹⁴ The Commission expressly rejected similar arguments that they have violated the separation of powers, even if litigation is pending.¹⁵

“The FCC has authority to waive its rules if there is ‘good cause’ to do so. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”¹⁶ The issue of whether the Commission has the authority to waive any of its rules is settled law. In fact, the Commission previously addressed this issue in its 2015 Order.¹⁷ Both the courts and the Commission have already decided that the Commission has

¹⁰ See, 2015 Order, ¶ 13; Anda Order, ¶ 21; *Reply in Support of Radnet Management Inc. and Its Affiliates’ Petition for Waiver*, Dkt Nos. 02-278 and 05-338, filed Feb. 20, 2015; *Reply in Support of National Pen’s Petition for Retroactive Waiver*, Dkt Nos. 02-278 and 05-338, filed Mar. 20, 2015; *Reply Comment of Dental Solutions, Inc. d/b/a Hogan Dental Laboratory to Comment of Dr. Gary Clemens*, Dkt Nos. 02-278 and 05-338, filed Feb. 20, 2015; *Reply Comments of Houghton Mifflin Harcourt Publishers, Inc. in Support of Retroactive Waiver*, Dkt Nos. 02-278 and 05-338, filed Feb. 20, 2015; *Reply Comments of Medversant Technologies, LLC to Comments of Edward Simon and Affiliated Health Care Associates, PC*, Dkt Nos. 02-278 and 05-338, filed Feb. 20, 2015; There are over 100 more of these replies and comments that have been omitted for the sake of space and time.

¹¹ *Wilder Comments*, . at 7.

¹² *NCTA v. Brand X*, 545 U.S. 967, 980 (2005).

¹³ *Id.* at 984.

¹⁴ *Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

¹⁵ Anda Order, ¶ 21.

¹⁶ *Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); 47 C.F.R. § 1.3.

¹⁷ 2015 Order, ¶¶ 13-16.

the authority to waive the application of the opt-out notice requirement for Scrip for good cause.

Wilder cites two cases, plainly distinguishable from the instant facts, to support its arguments. First, Wilder relies on the decision of the D.C. Circuit Court in *Natural Resources Defense Council v. EPA*.¹⁸ Such reliance is misplaced as the case concerns itself with an entirely different statutory and regulatory framework. Unlike the Commission, the EPA is *not* expressly authorized to waive or amend its own rules for good cause. Furthermore, Scrip only seeks waiver of the Commission's own rule, not a modification of the statute itself. These facts alone are more than enough to distinguish *Natural Resources* from this matter.

Second, Wilder's invocation of *Physicians Healthsource, Inc. v. Stryker Sales Corp.* is equally misplaced.¹⁹ The court there cites to no authority for its conclusions that the waiver would "fundamentally" violate the separation of powers and completely failed to acknowledge the legion of authority affirmatively recognizing the Commission's authority to grant retroactive waivers pursuant to 47 C.F.R. § 1.3.²⁰ Furthermore, the *Stryker* court appears to be under the mistaken impression that the opt-out notice requirements for solicited faxes are mandated by the statute, rather than by a rule created by the Commission.²¹ Furthermore, "district courts cannot determine the validity of FCC orders."²² The use of district court case law to argue that the Commission has no authority to waive its rules is opposite to holdings of the appellate courts.

The Commission has already recognized that confusion existed in the marketplace during the time that Scrip seeks a waiver.²³ Furthermore, Scrip has already stated that it was confused by

¹⁸ *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

¹⁹ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014).

²⁰ *Id.*; see also, *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) and *Keller Commc'ns v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997).

²¹ *Stryker*, 65 F. Supp. 3d at 497.

²² See *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461 (11th Cir. 2012); *CE Design, Ltd. V. Prism Bus. Media, Inc.*, 606 F.3d 443, 448 (7th Cir. 2010) ("Deeming agency action valid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders.")

²³ 2015 Order, ¶ 9.

the notice requirement and its application to the facsimiles sent when consent existed. Since there is no public interest in strict enforcement of the TCPA when it creates confusion in its application and causes substantial harm by requiring parties like Scrip to divert substantial capital, time, and resources from its lawful business to engage in unnecessary litigation. As such, Scrip's petition for waiver should be granted.

II. The Scrip Petition Is Not Untimely.

Wilder argues that Scrip's petition is untimely for two reasons: first, that Scrip should have filed for waiver prior to April 30, 2015 regardless of whether a civil suit was filed against them; and, second, that Scrip should have filed its petition immediately when it was sued because its present counsel had filed a petition for waiver prior to April 30, 2015 for another, wholly unaffiliated company. Wilder supports neither argument with case law or administrative orders. Instead, Wilder alleges only unsubstantiated facts and inferences to paint Scrip's petition in a negative light.

Prior to April 30, 2015, Scrip had no knowledge that it was open to legal liability for not including opt-out language in its facsimile transmissions – it thought it was in compliance based on its reasonable interpretation of Junk Fax Order regarding opt-out notices for customers who had previously consented to receive facsimiles from Scrip. Additionally, Scrip had ceased sending facsimile advertisements nearly eighteen months prior to April 30, 2015. Consequently, it was reasonable for Scrip to conclude it had not offended any laws or regulations, and that it need not monitor the Commission's orders – and so it was unaware of the Anda Order and the April 30, 2015 deadline to apply for retroactive waivers.

Wilder's only argument against this point is that because two other companies, out of 117 petitions for waiver filed after the Anda Order, were not facing lawsuits when they filed their

respective petitions, every other company in the country should also have filed prior to April 30, 2015. *See* Wilders’s Response, p. 9. Wilder essentially alleges that Scrip had some kind of obligation to predict that TCPA claims would arise from its actions. While the two other entities cited by Wilder, Truckers B2B LLC and Wells Fargo, proactively sought waivers, Wilder has not cited to any authority that requires Scrip to know that its understanding of the 2006 was incorrect, that it would one day face a TCPA lawsuit for its legitimate misunderstanding, and file a petition for waiver prior to April 30, 2015. This argument is clearly untenable. The Commission has already granted petitions filed after April 30, 2015.²⁴ The fact is that the granting of the waiver upholds the intent of the Anda Order and the 2015 Order by recognizing that Scrip would be prejudiced by the “confusion in the marketplace” should a waiver not be granted.²⁵

Wilder’s final untimeliness argument – that, as a matter of equity, Scrip should have filed its petition sooner than it did, but after service of Wilder’s complaint - likewise is unsupported by any legal authority. Moreover, the chronology of the Anda Order and the 2015 Order supports Scrip’s decision to file its petition when it did. Wilder’s TCPA complaint was not filed until June 30, 2015, nor served on Scrip until July 9, 2015, both dates well after the Commission’s April 30, 2015 deadline. Thus, even if Scrip had filed a petition for waiver immediately after receiving Wilder’s complaint, it still would have been two months after the Commission’s deadline.

Of course, the Commission did not publish its 2015 Order granting the 117 petitions until August 28, 2015. Had Scrip filed its petition after the deadline but before the 2015 Order, such a filing would have been a financial cost to Scrip, in the form of its attorneys’ fees, and done without a clear indication that the Commission would consider and accept such petitions. Thus, it was both prudent and expedient for Scrip to wait for the Commission’s 2015 Order and its indication that

²⁴ 2015 Order, ¶ 20.

²⁵ *Id.* ¶ 9.

the Commission would consider late petitions. Contrary to Wilder's argument, it would be inequitable and against public interest to strictly enforce the deadline against Scrip. Without knowing whether any of the petitions filed, let alone petitions filed after April 30, would be successful, Scrip chose the only responsible option - wait and monitor the Commission's rulings until Scrip could be sure that it had the legal and administrative authority to support its petition. Put another way, to making arguments without legal support is a dangerous tactic. As such, Scrip and its counsel found it prudent to wait until after the 2015 Order was published to submit its petition. There is no prejudice to Wilder by Scrip's choice to wait to file until after the 2015 Order, as the waiver sought is still only for those facsimiles sent prior to April 30, 2015.

Since the Commission has already granted late filings, and Scrip has provided sufficient reasons for its late filing, the Commission should grant Scrip's petition.

III. Proceedings on the Factual Knowledge of the Opt-Out Rules Is Unnecessary and Will Not Defeat Scrip's Presumption.

Again, without citing to legal authority, Wilder advances a baseless argument that it has a due-process right to investigate, before the Commission makes a decision on Scrip's petition, whether Scrip had actual knowledge of the opt-out rules.²⁶ The Commission has already rejected this argument.²⁷ Per the Commission's rules, a finding of "good cause" for granting a waiver is based on two factors: the presence of contradictory language in the Junk Fax Order, and the lack of explicit notice regarding the Commission's intent to adopt the regulation. As was the case with the granted petitions, there is "nothing in the record here demonstrating that [Petitioner] understood that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission, but nonetheless failed to do so."²⁸

²⁶ *Wilder Comments*, pp. 9-10.

²⁷ 2015 Order, ¶¶ 18-19.

²⁸ Anda Order, ¶ 26; 2015 Order, ¶ 15.

In its orders, the Commission has already recognized that it does not need to consider whether Scrip had actual knowledge of the opt-out rules when it sent its faxes.²⁹ Such factual considerations are for the triers of fact to decide in individual TCPA lawsuits. The Commission has already held that petitioners who cite the confusing, contradicting language of the rules are entitled a presumption of confusion.³⁰ Being sued for noncompliance, or including opt-out language in some facsimiles but not in others, does not rebut the presumption.³¹

Furthermore, postponing a decision on Scrip's petition until after the close of discovery in a class-action TCPA lawsuit would take months, if not more than a year. All the while, Wilder cannot, and does not, even allege that such evidence even exists. Again, and without citations to case law or statute, outside of the 47 C.F.R. § 1.1, Wilder argues that it has a due-process right to investigate Scrip. Since no law supports Wilder's claim of due-process, and there is no new reason or purpose for discovery hearings beyond what has already been heard and decide by the Commission in its previous orders, the Commission should deny Wilder's petition for discovery proceedings and grant Scrip's petition.

Finally, none of the entites that sought and were granted retroactive waivers prior to Scrip's petition were subjected to any kind of discovery hearing despite the fact that they faced TCPA litigation.³² As such, it would be an improper burden to subject Scrip to such procedures as a prerequisite to obtaining the same waiver granted to others.

CONCLUSION

Scrip Holding Company, a/k/a Scrip, Inc., respectfully requests that the Commission grant its petition for a retroactive waiver for Scrip's liability under 47 C.F.R. § 64.1200(a)(4)(iv).

²⁹ *Id.*

³⁰ 2015 Order, ¶19.

³¹ *Id.*

³² *See* 2015 Order.

Date: October 15, 2015

Respectfully submitted,

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